IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1887

In Re:

WILLIAM MAULDIN SMITH,

an Attorney

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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OPINION BELOW

The opinion of the Supreme Court of Illinois rendered on January 26, 1979 is reported at ..... Ill.2d ..... , 387 N.E.2d 316, 25 Ill.Dec. 660, and is reprinted herein. (Appendix A).

JURISDICTION

The Supreme Court of Illinois entered a judgment of disbarment on January 26, 1979. A petition for rehearing, timely filed, was denied on March 30, 1979. (Appendix B).

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Does petitioner, a lawyer, in an adversary disbarment proceeding, as a due process right, have the right to effective assistance of counsel?

2. Whether the Illinois "Attorney Disciplinary Proceeding", that requires a lawyer to present any mitigation evidence prior to a determination of whether he acted unethically or forego presenting any mitigation evidence, violates due process?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

XIV Amendment, United States Constitution.

Section 1. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

Attorneys are supervised in Illinois by the State Supreme Court through the Attorney Registration and Disciplinary Commission. (Chap. 110A, Sec. 751-770.) This Commission investigates complaints against attorneys and then, if it chooses, "prosecutes" the attorney before a Hearing Board. (Chap. 110A, Sec. 753.) Decisions of the Hearing Board are then reviewed by a Review Board and finally by the Illinois Supreme Court. The Attorney Registration and Disciplinary Commission has rules governing the hearings that demonstrate the hearings are adversary in nature. (See Appendix C).

The Commission filed charges accusing petitioner of conversion of clients' funds.

Attorney Sidney S. Altman filed a statement with the Hearing Board that he would be proceeding as counsel for petitioner and filed an answer raising an affirmative defense. Due to lack of knowledge concerning the rules of practice governing these proceedings, more specifically Rule 5.4,[1] he expected a response from the attorney for the Commission, or if no response, that the affirmative defense would be accepted as true. He was not prepared to cross-examine the witnesses called by the Disciplinary Commission, on the vital matters raised by the defense, (Tr. 49, 73) or present defense evidence. (Tr. 74-75)

[1] Rule 5.4 reads:

No reply need be filed by the Administrator. Any new matter alleged in the respondent's answer shall be deemed denied.

At the termination of the hearing, counsel for petitioner made a statement to excuse himself for his inadequate representation. He stated:

> "Mr. Altman: May I add the nature of these proceedings and my role as colleague? And, I think, I may have mentioned this before, that the early canons of ethics called upon lawyers to help and befriend other lawyers, which is precisely what I am doing without any remuneration either in this case or in the early Taylor case; simply because of this duty, and because, *apparently, he is not able to obtain any other experienced or competent counsel to represent him.*
>
> *I am leaving his defense with him, and I am ready to advise him in a guiding capacity on the stand. And the rest of his defense, I depended on him to procure all his own evidence. And I put the burden of responsibility on him to be able to rebut or meet whatever testimony, adverse testimony, would come up.*" (Tr. 143) (Emphasis added.)

The Hearing Board never inquired of petitioner about his acquiescence in counsel's interpretation of the "lawyer role."

The rules of the Illinois Supreme Court permitted sanctions, including reprimand, suspension and disbarment and transfer to inactive status, for mental disability, or addiction to drugs or intoxicants. (Chap. 110A, Sec. 757, 758, 761, 762) The Hearing Board never offered petitioner an opportunity to present evidence in regard to the appropriateness of the degree of sanctions.

The Board recommended disbarment. This was affirmed by the Illinois Supreme Court.

RULINGS BELOW

The Illinois Supreme Court considered on its merits and rejected petitioner's contentions. (1) He was denied a due process right of effective assistance of counsel (App. A, pp. 4a-7a) and (2) that "Due process may require a bifurcated hearing procedure with separate hearings on "guilt" and "sanctions" . . . where the hearing panel[2] would first hear the evidence of misconduct and then recess or adjourn to determine whether the charges had been proved, and . . . in the event the charges were found to have been proved, the same panel would then reconvene for the purpose of hearing evidence in mitigation and determining the specific discipline to be recommended." (App. A, p. 4a)

[2] The Court referred to Panel, because the Hearing Board acts in "Panels" of 3 lawyers sitting as "judges" Rule 3.1, Rules of the Attorney Registration and Disciplinary Commission, Chap. 110A, Sec. 770.

REASONS FOR GRANTING THE WRIT

I.

WHERE PETITIONER, AN ATTORNEY, IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE ADVERSARY HEARING THAT RESULTED IN HIS DISBARMENT, HE HAS BEEN DENIED "DUE PROCESS" OF LAW.

The Illinois Supreme Court *appears* to have held that a lawyer has no right to effective assistance of counsel in an adversary disbarment proceeding. We say, *appears*, because the court's opinion is like quicksilver and does not state with clarity whether it is based on the premise that there is no right to effective counsel or the right was waived or not violated. (App. A, pp. 4a-7a). Petitioner will proceed to demonstrate that petitioner had a due process right to effective counsel that was not waived; that he was denied effective counsel; that the proceedings resulting in his disbarment therefore fail to meet the standards of due process.

A. At A Disbarment Proceeding Petitioner Has A Due Process Right To Effective Assistance Of Counsel.

At a disbarment proceeding the State of Illinois is represented by an attorney—"prosecutor" and formal rules of evidence are in force. Under the standards set by this Court in *Gagnon v. Scarpelli*, 411 U.S. 778, 36 L.Ed.2d 656 (1973), due process requires that respondent have the right to counsel. For where the State is represented by counsel, the right to counsel "is an integral part of . . . the . . . right to defend." Justice Berger dissent in *Faretta v. California*, 442 U.S. 806 (1975). At a disbarment proceeding—an "adversary proceeding" *Re Ruffalo*, 390 U.S. 544, 20 L.Ed.2d 117

(1968)—respondent has a right to counsel because "A hearing in which counsel . . . is present only on behalf of one side is inherently unsatisfactory if not unfair." *Perry v. Willard*, 247 Ore. 145, 427 P.2d 1020 (1967). The fact that respondent "is an attorney is, of course, immaterial to consideration of his right to" counsel. See *Glasser v. United States*, 315 U.S. 60, 86 L.Ed.2d 680 (1941). His being "an attorney does not necessarily mean he is capable of adequately defending himself." *United States v. Harrison*, 451 F.2d 1013 (1971).

The right to counsel requires effective representation, *McMann v. Richardson*, 397 U.S. 759, 25 L.Ed.2d 763 (1970), because, absent counsel, there is a "likelihood of unreliability." *Desist v. United States*, 394 U.S. 244, 22 L.Ed.2d 248, 255 (1969). See *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed.2d 799, 805 (1963). The "effective assistance" concept developed as to criminal proceedings should be applicable to disbarment proceedings, because their nature and function are sufficiently analogous. In both (a) *only* the State can be the moving party, (b) the purpose is to protect the public, (c) respondent has a vital interest to be protected and (d) an erroneous decision against tne respondent is contra to the best interest of the State. Sound policy mandates that the "effective counsel" principle should apply to the due process right to counsel applicable in disbarment proceedings.

B. Petitioner Was Denied Effective Assistance Of Counsel.

Effective representation involves more than "the mere physical presence," *Holloway v. Arkansas*, 435 U.S. 475, 55 L.Ed.2d 426 at 438 (1978), it involves "advocacy" *Anders v. California*, 386 U.S. 738, 18 L.Ed. 493 (1967),

and preparation, including investigation of law and facts, *Wolfs v. Britton*, 509 F.2d 304 (1975); *People v. Ibberra*, 60 Cal. 2d 460, 386 P.2d 487 (1969).

Here, amazingly enough, counsel volunteered near *the end of the hearing* that he was counsel only *de jure* and not "in fact." He stated:

> "May I add the nature of these proceedings and my role as colleague? And, I think, I may have mentioned this before, that the early canons of ethics called upon lawyers to help and befriend other lawyers, which is precisely what I am doing without any remuneration either in this case or in the early Taylor case; simply because of this duty, and because, *apparently, he is not able to obtain any other experienced or competent counsel to represent him.*
>
> *I am leaving his defense with him, and I am ready to advise him in a guiding capacity on the stand. And the rest of his defense, I depended on him to procure all of his own evidence. And I put the burden of responsibility on him to be able to rebut or meet whatever testimony, adverse testimony, would come up.*" (Tr. 143) (Emphasis added.)

The Hearing Board did nothing to inquire about his truncated "lawyer" role. Respondent was being interrogated by a panel member when his attorney made this statement.

Counsel's statement of his own ineffective assistance is corroborated. He was unaware of the procedural rules governing disciplinary hearings, including the fact that respondent could be called as an adverse witness. He had filed an answer to the complaint alleging the charged conversions of funds were actually loans to respondent by his clients. No subsequent pleadings were filed by the Administrator, and he was unaware that Commission Rule 5.4 provided: "No reply need be filed by

the Administrator. Any new matter alleged in the respondent's answer shall be deemed denied." (Rules of the Attorney Registration and Disciplinary Commission, art. V, R. 5.4, Ill. Rev. Stat. 1975, ch. 110A, following par. 770.) He therefore was totally unprepared, because he believed the defense had been "admitted."

His cross-examination of the Commission's three witnesses was so poor as to be a mockery of the term cross-examination. The low calibre of cross-examination by counsel forced petitioner to attempt himself to cross-examine a witness. However, he then was confronted with having the panel rule the examination of the witness—his own client—was improper. (Tr. 46-47) He was on the horns of a dilemma. He could not forcibly argue with the panel that was sitting in judgment of him. Counsel for petitioner did not cross-examine the witnesses as to whether they loaned respondent funds, thereby permitting the hearing panel to rely on lack of cross-examination as reason for disbelieving petitioner's testimony. (Report of Hearing Panel, p. 6, par. 9; p. 8, par. 15; p. 10, par. 22.) He even waived final argument. (Tr. 145)

His performance was of such a low calibre as to amount to no representation and to reduce the proceedings to a farce and sham. What occurred was no error of strategy or judgment, but, as counsel himself admitted, (Tr. 143) the failure to perform as a lawyer.

C. Respondent Did Not Waive Effective Assistance.

Petitioner obtained counsel. That petitioner himself is a lawyer cannot be equated to a knowing waiver of the right to "effective" counsel. *Glasser v. United States*, 315 U.S. 60, 86 L.Ed.2d 680 (1941); *United States v. Harrison*, 451 F.2d 1013 (1971). Nor is waiver shown

by his failure to object when his lawyer disclaimed being an advocate. He was "on the witness stand" and was in no position to disagree with his lawyer before the judges. His silence and continuation with his "free counsel"[3] is not waiver of the right to effective assistance. *Glasser v. United States*, 315 U.S. 60, 86 L.Ed.2d 680 (1941).

D. In That Petitioner Had Ineffective Assistance, He Was Denied The Opportunity To Have A Reliable And Fair Determination As To Whether He Was To Be Disbarred.

The Illinois Supreme Court, upon its review of complainants' testimony (absent cross-examination) and petitioner's testimony (absent the guiding hand of counsel), decided "there is no reason to believe that a rehearing would present any different evidence on the merits of the complainants or any different findings by the Board." (App. p. 7a) The position of the Illinois Supreme Court is contra to the holdings of this Court, that absent adequate counsel there is a "likelihood of unreliability" *Desist v. United States*, 394 U.S. 244, 22 L.Ed.2d 248 (1969), and where counsel is denied, the court cannot speculate as to the degree of prejudice. *Glasser v. United States*, 315 U.S. 60, 86 L.Ed.2d 680 (1941).

Here, there was counsel only in form. He did nothing other than appear. As admitted:

> *"I depended on him [respondent] to procure all his own evidence. And I put the burden of responsibility on him to be able to rebut or meet whatever testimony, adverse testimony, would come up."* (Tr. 143)

[3] Petitioner's inability to obtain other more competent counsel was apparently due to his financial inability to do so. (Tr. 143)

There was a total denial of effective counsel and, accordingly, there should be a reversal for a new hearing. *Glasser v. United States*, 315 U.S. 60, 86 L.Ed. 2d 680 (1941).

If a finding by an original trier of fact may be unreliable, absent counsel, there is no reason to believe that an appellate court can review the same facts and reliably determine the truth.

Moreover, adequate counsel function is not only to contest the opposition's evidence, but mitigate its effect. Here, disbarment was found appropriate not only because of alleged "guilt" on the charge but "together with the absence of candor, remorse or attempts at restitution." (App. A, p. 7a) Adequate representation of counsel could have aided respondent properly to present his circumstances in a manner that could have resulted in disciplinary action, less than disbarment.

Denial of effective assistance voids the proceedings that resulted in petitioner's disbarment.

II.

THE ILLINOIS "ATTORNEY DISCIPLINARY PROCEEDING" THAT REQUIRES A LAWYER TO PRESENT ANY MITIGATION EVIDE 'CE PRIOR TO A DETERMINATION OF WHETHER HE ACTED UNETHICALLY OR FOREGO PRESENTING MITIGATION EVIDENCE VIOLATES DUE PROCESS.

A hearing to determine petitioner's right to practice law is governed by procedural due process. *Re Ruffalo*, 390 U.S. 544, 20 L.Ed.2d 117 (1968); *Dixon v. Love*, 431 U.S. 105, 52 L.Ed.2d 172. And where there exists

various sanctions that can be imposed,[4] procedural due process must govern not only "if" sanctions are to be imposed, but the procedure to determine "what" sanctions are to be imposed. *Cf. Gardner v. Florida*, 430 U.S. 349, 51 L.Ed.2d 393 (1977); *Morrissey v. Brewer*, 408 U.S. 471, 33 L.Ed.2d 484 (1972).

The Illinois procedure violates due process because petitioner is required to present matters "in mitigation" to the panel, judging the charges against him prior to any determination of guilt. He is not permitted a bifurcated procedure, where first he can contest his guilt and then, if it is determined he has violated rules of ethics, present matters in mitigation.

> Respondent suggests that due process may require a bifurcated hearing procedure with separate hearings on "guilt" and "sanctions" instead of the combined hearing system contemplated by our rules and used here. As we understand this argument, the hearing panel would first hear the evidence of misconduct and then recess or adjourn to determine whether the charges had been proved. In the event the charges were found to have been proved, the same panel would then reconvene for the purpose of hearing evidence in mitigation and determining the specific discipline to be recommended. Respondent cites no authority which holds that procedure either necessary or desirable in a professional disciplinary proceeding, and we believe it is not. *In re Smith*, ... Ill.2d ....., 387 N.E.2d 316, 319 (1979).

A lawyer contesting that he acted unethically cannot be expected to admit personal deficiencies mitigating

[4] Pursuant to rules, an attorney can be reprimanded, suspended, disbarred, or removed from practice to an inactive status, where his actions are caused by medical conditions, including mental illness or abuse of drugs or alcohol, Chap. 110A, Sec. 758, 761, 762 Ill.Rev.Stat.

impropriety prior to a ruling on whether he is "guilty." The Illinois procedure creates an "unconstitutional dilemma," see *Simmons v. United States*, 390 U.S. 377, 19 L.Ed.2d 1247 (1968); *United States v. Jackson*, 390 U.S. 570, 20 L.Ed.2d 138 (1968). It requires him either to defend and surrender his right to present mitigating evidence or admit impropriety and seek to lessen sanctions with evidence of mitigation. This is analogous to the procedure held unconstitutional in *United States v. Jackson*, 390 U.S. 570, 20 L.Ed.2d 138 (1968).

Petitioner having chosen to dispute "guilt" was deprived of the right "ancient in the law . . . to make a statement in his own behalf and present any information in mitigation of punishment." *United States v. Behrens*, 375 U.S. 162, 165, 11 L.Ed.2d 224, 227 (1963). The procedure permitted imposition of sanctions, without individualized judgment that considers "the character and record of the individual offender and the circumstances of the particular offense," that is required by due process. *Jurek v. Texas*, 428 U.S. 262, 49 L.Ed.2d 929 (1976); *Woodeen v. North Carolina*, 428 U.S. 28, 49 L.Ed.2d 944 (1976).

Due process requires a sanction proceeding, separate from "guilt proceedings" in attorney disciplinary proceedings. The Illinois procedure that prevents separate consideration of guilt and sanctions, violates due process.

CONCLUSION

For the foregoing reasons, Certiorari should be allowed to review the decision of the Illinois Supreme Court.

Respectfully submitted,

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CHARLES HARROUN, third year law student, University of Detroit, assisted in the research and preparation of this petition.

APPENDIX A

Docket No. 50871—Agenda 7—November 1978.
In re WILLIAM MAULDIN SMITH, Attorney,
Respondent.

MR. JUSTICE UNDERWOOD delivered the opinion of the court:

This is a disciplinary proceeding against the respondent attorney, William Mauldin Smith, pursuant to Supreme Court Rules 751 to 770 (Ill. Rev. Stat. 1977, ch. 110A, pars. 751 to 770) in which both the hearing panel and the Review Board of the Attorney Registration and Disciplinary Commission have recommended that respondent be disbarred because of his conversion of clients' funds. The case is before us on the objections of respondent to the report and recommendations of the Review Board, since "the ultimate responsibility for determining and imposing discipline rests with this court." *In re Wyatt* (1972), 53 Ill. 2d 44, 45.

On February 2, 1977, the Administrator of the Commission filed a three-count complaint against respondent charging him with three separate instances of conversion. Count I concerned respondent's representation of Bennie Smith, a client who retained respondent in June 1972 to represent him in a civil action brought against the city of Chicago and two police officers. A 1974 jury trial of that action resulted in an $8,000 judgment for Bennie Smith. He testified that when advised that the city had two years in which to pay the judgment, he told respondent that he would wait the two years since he would receive interest on the judgment for that period.

Thereafter, however, respondent signed the name "Bennie E. Smith" to an assignment of judgment and sold

the $8,000 judgment to a private party for $7,490. The check received in payment was endorsed by respondent "Bennie Smith" and deposited in respondent's account at the Gateway National Bank of Chicago. Respondent subsequently used the funds for his own purposes. Bennie Smith testified that he did not authorize the assignment of the judgment at a discount, nor was he aware that respondent had done so until almost two years later when he called respondent concerning payment by the city. So far as the record indicates or we have been informed, no part of the judgment proceeds have been paid to Bennie Smith.

Count II concerns respondent's representation of Charles Miller in a 1974 action against his employer for personal injuries received in the course of his employment. After an Industrial Commission hearing, Miller was awarded $750. A check for that amount, made payable to "Charles Miller," was sent by the insurance company to respondent, who endorsed the name "Charles Miller" on the check and deposited it in respondent's account at the Gateway Bank. Again, the proceeds were converted by respondent to his own use. Miller testified that he repeatedly called respondent, who continually denied receiving the money and told Miller he would call him when payment was received. Respondent never accounted for the $750, and the client has received nothing.

Count III of the Administrator's complaint concerns respondent's dealings with Floyd Johnson, who had retained respondent to represent him in a claim arising out of an automobile accident. Respondent negotiated a settlement, without Johnson's authorization or consent, and received a check, dated November 14, 1974, payable to "W. Mauldin Smith & Associates, Ltd. and Floyd Johnson" in the amount of $450. Respondent endorsed Johnson's name on the check, deposited it in respondent's account at the Gateway Bank and used it, too, for his own

purposes. Although Johnson testified regarding repeated calls to respondent concerning the case, the client was not told until 1976 that the case had been settled. When he did learn of the settlement and asked for the money, respondent replied that "somebody had cashed the check." As with the other two clients, Johnson has received no part of the $450.

Respondent's defense was based upon his testimony before the Hearing Board that each of the three clients had signed a power-of-attorney form which authorized respondent to sign the client's name to legal documents, drafts, etc., and that each client had agreed to loan respondent the money received on the judment or settlement of his claim. In support of this contention, respondent produced power-of-attorney forms signed by Bennie Smith and Floyd Johnson. Smith, Miller and Johnson each testified before the Hearing Board that he had never agreed to loan respondent any money. Respondent failed to produce any documentary evidence to support his "loan" theory, he did not describe the amounts and terms of the loans, and he admitted that he did not give a note or other evidence of indebtedness to any of the clients.

As this court stated in a recent disciplinary action, "[t]he findings made in a disciplinary proceeding are entitled to the same weight as the findings of any trier of fact in our judicial system, and the credibility of witnesses is to be determined by the commissioners who hear and observe the witnesses." (*In re Smith* (1976), 63 Ill. 2d 250, 255.) The Hearing Board, the members of which heard the witnesses and observed their demeanor, found respondent's loan testimony to be "incapable of belief." We agree. The only evidence supporting this theory that was introduced at the hearing was the uncorroborated testimony of respondent. In contrast to this was the testimony of Smith, Miller and Johnson, each of whom stated that there was no discussion of a loan nor was any loan agreement,

written or oral, entered into. Regardless of whether, as respondent argues, the executed powers of attorney gave him the authority to settle claims on behalf of his clients and endorse and negotiate the checks received, he obviously had no right to convert to his own use the entire proceeds of the checks.

Respondent has urged us to remand this cause for a new hearing, contending that he was not given adequate time to prepare his case and that the Hearing Board erred in denying his requested continuances. The Hearing Board changed the original hearing date from April 27 to May 9 in response to respondent's request for postponement, and we cannot say the Board abused its discretion in denying further continuances where the complaint was served on him on February 10, and the hearing held on May 9. It is desirable and in the public interest that attorney disciplinary proceedings move expeditiously, consistent, of course, with due process requirements.

Respondent suggests that due process may require a bifurcated hearing procedure with separate hearings on "guilt" and "sanctions" instead of the combined hearing system contemplated by our rules and used here. As we understand this argument, the hearing panel would first hear the evidence of misconduct and then recess or adjourn to determine whether the charges had been proved. In the event the charges were found to have been proved, the same panel would then reconvene for the purpose of hearing evidence in mitigation and determining the specific discipline to be recommended. Respondent cites no authority which holds that procedure either necessary or desirable in a professional disciplinary proceeding, and we believe it is not.

One further argument requires discussion. Respondent was represented before the Hearing Board by what apparently was the attorney of his choice. That individual also represented respondent before the Review Board and

filed a brief in this court. Oral argument was not requested and the cause was set on the November term calendar for November 15. On November 15 motions for substitution of counsel and oral argument were filed by respondent. The motions were denied on the 16th as to oral argument and allowed as to substitution of counsel, and additional briefing by substituted counsel was permitted. That brief vigorously attacks the quality of representation afforded respondent by his original counsel. The argument that the representation was so inadequate as to amount to none at all is in part bottomed upon a lack of knowledge of the procedural rules governing disciplinary hearings, including the fact that respondent could be called as an adverse witness. Respondent's attorney had filed an answer to the complaint in which it was alleged that the charged conversions of funds were actually loans to respondent by his clients. No subsequent pleadings were filed by the Administrator, and counsel for respondent was apparently unaware that Commission Rule 5.4 provided: "No reply need be filed by the Administrator. Any new matter alleged in the respondent's answer shall be deemed denied." (Rules of the Attorney Registration and Disciplinary Commission, art. V, R. 5.4, Ill. Rev. Stat. 1975, ch. 110A, following par. 770.) New counsel now argues that, having believed the affirmative loan defense was admitted, original counsel was unprepared to properly cross-examine the three former clients when they denied having ever discussed any loan arangements with respondent. There is, however, another possible explanation of counsel's failure to cross-examine the three witnesses regarding any loan discussions: all of the witnesses had been unequivocal in their denials, and cross-examination might have been more harmful than helpful. Too, we note that Bennie Smith was cross-examined by both respondent and his lawyer with no demonstrable effect upon the integrity of his testimony.

Substituted counsel also focuses upon a statement by the first lawyer made near the conclusion of the testimony before the Hearing Board:

> "[Defense counsel]: May I add the nature of these proceedings and my role as colleague? And, I think, I may have mentioned this before, that the early canons of ethics called upon lawyers to help and befriend other lawyers, which is precisely what I am doing without any remuneration either in this case or in the early Taylor case; simply because of this duty, and because, apparently, he is not able to obtain any other experienced or competent counsel to represent him.
>
> I am leaving his defense with him, and I am ready to advise him in a guiding capacity on the stand. And the rest of his defense, I depended on him to procure all his own evidence. And I put the burden of responsibility on him to be able to rebut or meet whatever testimony, adverse testimony, would come up. ***"

While the purpose of the quoted statement is unclear to us, a reading of the record does not persuade us that respondent has been unfairly dealt with. There is in this record no indication by respondent of the slightest dissatisfaction with the quality of representation by his lawyer prior to the motion for substitution of counsel filed in this court. It is of primary importance, in considering the argument that a remand for a new hearing is required by reason of the asserted inadequacy of counsel's representation of respondent, that respondent is not unskilled in the law. He is not one, like the usual defendant in a criminal case, who knows little or nothing of the need for investigation, witnesses, proof of mitigating circumstances, and similar matters. He is a licensed lawyer, and his active participation in the hearing, together with his responses to the questions of the hearing panel members, clearly indicate that he was not intimidated by the proceedings. He had known the charges against him for a minimum of some three months prior to the hearings and can scarcely complain of a lack of time to prepare, particularly when he

personally knew all that had occurred between him and his clients.

The testimony by the defrauded clients was positive and convincing, and a reading of respondent's testimony simply corroborates the Hearing Board's finding that it is unworthy of belief. In short, there is no reason to believe that a rehearing would present any different evidence on the merits of the complaints or any different findings by the Board.

As this court stated recently, "[w]hen a lawyer *** converts a client's funds to his own personal use he commits an act involving moral turpitude, and, in the absence of mitigating circumstances, such conversion is a gross violation of the attorney's oath, calling for the attorney's disbarment." (*In re Stillo* (1977), 68 Ill. 2d 49, 54.) In fact this court has even disbarred an attorney for an isolated act of conversion. (See cases cited in *In re Fumo* (1961), 22 Ill. 2d 429, 431.) Considering that respondent has been guilty of three independent acts of conversion and long-continuing false representations to his clients, together with the absence of candor, remorse, or attempts at restitution, a proper sense of concern for the protection of the public requires respondent's disbarment.

It is so ordered.

Respondent disbarred.

MR. JUSTICE WARD took no part in the consideration or decision of this case.

APPENDIX B

United States of America

State of Illinois } ss.
Supreme Court }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of January in the year of our Lord, one thousand nine hundred and seventy-nine, within and for the State of Illinois.

PRESENT: JOSEPH H. GOLDENHERSH, CHIEF JUSTICE

JUSTICE ROBERT C. UNDERWOOD — JUSTICE DANIEL P. WARD

JUSTICE HOWARD C. RYAN — JUSTICE WILLIAM G. CLARK

JUSTICE THOMAS J. MORAN — JUSTICE THOMAS E. KLUCZYNSKI

WILLIAM J. SCOTT, ATTORNEY GENERAL

LOUIE F. DEAN, MARSHAL

ATTEST: CLELL L. WOODS, CLERK

BE IT REMEMBERED, that, to-wit: on the 26th day of January, A.D. 1979, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

In re:

No. 50871

WILLIAM MAULDIN SMITH,
an Attorney

Disciplinary Commission—77 CH 3

And now, on this day, the Court having duly considered the Report of the Review Board, and exceptions thereto, together with the briefs filed herein, and being fully advised in the premises;

IT IS HEREBY ORDERED that respondent, William Mauldin Smith, be disbarred.

I, CLELL L. WOODS, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this ..... day of ..... A.D. 19.....

Clerk,
Supreme Court of the State of Illinois.

United States of America

State of Illinois } ss.
Supreme Court }

At a Term of the Supreme Court, *begun and held in Springfield, on Monday, the* twelfth *day of* March *in the year of our Lord, one thousand nine hundred and* seventy-nine *, within and for the State of Illinois.*

PRESENT: JOSEPH H. GOLDENHERSH, CHIEF JUSTICE

JUSTICE ROBERT C. UNDERWOOD — JUSTICE DANIEL P. WARD

JUSTICE HOWARD C. RYAN — JUSTICE WILLIAM G. CLARK

JUSTICE THOMAS J. MORAN — JUSTICE THOMAS E. KLUCZYNSKI

WILLIAM J. SCOTT, ATTORNEY GENERAL

LOUIE F. DEAN, MARSHAL

ATTEST: CLELL L. WOODS, CLERK

BE IT REMEMBERED, that, to-wit: on the 30th day of March, A.D. 1979, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

In re:

No. 50871

WILLIAM MAULDIN SMITH,
an Attorney

Disciplinary Commission—77 CH 3

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being fully advised of and concerning the premises, doth overrule the prayer of said petition and denies a rehearing in this cause.

United States of America

State of Illinois } ss.
Supreme Court }

I, CLELL L. WOODS, Clerk of the Supreme Court of the State of Illinois, and keeper of the records, files and Seal thereof, do hereby certify the foregoing to be a true copy of the mandate of this Court and the order entered March 30, 1979, denying petition for rehearing in a certain cause entitled:

In re:

No. 50871

WILLIAM MAULDIN SMITH,
an Attorney

Disciplinary Commission—77 CH 3

filed in this office on the 11th day of May A.D. 1978.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said court this 8th day of June 1979.

/s/ CLELL L. WOODS
Clerk,
Supreme Court of the State of Illinois.

(Seal)

APPENDIX C

RULES OF THE ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION

ARTICLE I. THE ADMINISTRATOR

ARTICLE II. THE INQUIRY BOARDS

ARTICLE III. THE HEARING BOARDS

ARTICLE IV. COMPLAINTS

ARTICLE V. ANSWER & FURTHER PLEADINGS: PROCEDURE

ARTICLE VI. DISCOVERY & DEPOSITIONS

ARTICLE VII. FAILURE TO ANSWER

ARTICLE VIII. TIME OF THE HEARING

ARTICLE IX. CONDUCT OF THE HEARING

ARTICLE X. REVIEW

ARTICLE XI. REINSTATEMENT

For Disciplinary Proceedings Under Illinois Supreme Court Rules 751 to 770

PREAMBLE

It is the policy of the Commission that disciplinary matters shall be handled as expeditiously as possible, with due regard to the right of the respondent to have adequate time to prepare his defense. The courts, the public, the Bar, and the respondent all have a vital interest in an early determination of any charge which bears upon the fitness of an attorney to practice his profession. The elimination of unnecessary delay was a major objective of the Court in creating the Commission and in establishing the office of Administrator. Implementation of this objective is one of the principal purposes of the following rules.

Adopted eff. May 12, 1973.

78-1887

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. [redacted]

WILLIAM MAULDIN SMITH,

Petitioner,

vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS,

Respondent.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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Attorney for Respondent.

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IN THE

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vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS,
Respondent.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

STATEMENT OF THE CASE.

Petition Number 78-1187 arises from the judgment of the Supreme Court of Illinois in the case of *In Re Smith*, case number 50871, entered January 26, 1979, 75 Ill. 2d 134, 387 N. E. 2d 316. Respondent submits the following in opposition to that *Petition*.

STATEMENT OF FACTS.

On January 26, 1979, the Supreme Court of Illinois handed down its opinion disbarring the Petitioner William Mauldin Smith. The decision of the Court below was based on its finding that Petitioner had converted clients' funds to his own use.

Respondent refers this Court to the opinion of the Court below (attached as Appendix A to the *Petition*).

QUESTIONS PRESENTED.

For the purpose of argument, Respondent will address the questions as raised by Petitioner.

REASONS FOR DENYING THE WRIT.

I.

THE PROCEEDING BELOW DID NOT DEPRIVE PETITIONER OF DUE PROCESS OF LAW IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Petitioner argues that he was the unwitting victim of ineffective legal representation in the proceeding below. He contends that the performance of his attorney at the disciplinary hearing, "was of such low calibre as to amount to no representation and to reduce the proceedings to a farce and sham." (Petition, p. 9.) Petitioner makes this claim despite the fact that he was represented by an attorney of his own choosing. *In Re Smith*, 75 Ill. 2d 134, 387 N. E. 2d 316 (1979). Further, as the Court below pointed out, Petitioner did not express any dissatisfaction with his attorney at the hearing.

Petitioner's argument is based on the theory that there is a due process right to effective assistance of counsel at a disciplinary proceeding. Certainly the right to counsel is guaranteed by the Sixth Amendment and is applicable to the States by virtue of the Fourteenth Amendment, thus making it unconstitutional to try a person for a felony in a state court unless he has a lawyer or has validly waived one. *Burgett* v. *Texas*, 389 U. S. 109, 114 (1967); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). It is important to note however, that the right to assistance of counsel exists only in a criminal case where the defendant is

unable to employ counsel or is incapable of adequately making his own defense. *Powell* v. *Alabama*, 287 U. S. 45, 66 (1932). A person accused of a crime requires the "guiding hand of counsel at every step in the proceedings against him." *Id.*, 287 U. S. at 69.

An attorney disciplinary proceeding however, is not a criminal matter, and as such there is no due process guarantee of assistance of counsel.[1] Petitioner's reliance upon the Sixth and Fourteenth Amendments to support his Petition for Writ of Certiorari is therefore misplaced. Petitioner fails to recognize that the purpose of a disbarment proceeding is not to punish an attorney, but to preserve the courts of justice from the official ministration of persons unfit to practice in them. *Ex Parte Wall*, 107 U. S. 265, 288 (1882). Attorney disciplinary proceedings are deemed to be free of any due process defects, so far as procedure is concerned, if the basic requirements of notice and hearing are met. *In re Ruffalo*, 390 U. S. 544, 550-551 (1968). The record below reveals that the Petitioner was afforded both notice of the charge and an opportunity to defend. The essence of an attorney disciplinary proceeding is not to decide on matters regarding the alleged criminality of a person's acts, but rather to determine the moral fitness of an attorney to continue in the practice of law. *In re Daley*, 549 F. 2d 469, 475 (7th Cir., 1977); *cert. den.* 434 U. S. 829 (1977).

Nevertheless, Petitioner claims that the criminal law concept of effective assistance of counsel *should* be applicable to disbarment proceedings because, "their nature and function are sufficiently analogous." (*Petition*, p. 7.) In support, Petitioner relies upon the decisions of this Court in the area of criminal procedure.[2] He cites no case to support his conjecture.

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1. Illinois attorney disciplinary proceedings, "shall be conducted according to the practice of civil cases" and with the standard of proof in all hearings fixed as clear and convincing evidence. *Ill. Rev. Stat.* ch. 110A, 753(c) (1977).

2. *See, e.g., Glasser* v. *United States*, 315 U. S. 60 (1941); *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973); *Faretta* v. *California*,

(Footnote continued on next page.)

II.

THE COURT BELOW CORRECTLY DETERMINED THAT THE FOURTEENTH AMENDMENT DOES NOT MANDATE A BIFURCATED HEARING PROCEDURE IN AN ATTORNEY DISCIPLINARY ACTION.

The states have a compelling interest in the practice of the legal profession within their boundaries. *Goldfarb* v. *Virginia State Bar Association*, 421 U. S. 773, 792 (1975). Lawyers have historically been "officers of the court". *See, e.g., In re Primus*, 436 U. S. 412, 422 (1978). In Illinois, the power to discipline an attorney is inherent in the Supreme Court of Illinois. *In re Teitelbaum*, 13 Ill. 2d 586, 150 N. E. 2d 873, *Cert. Denied* 358 U. S. 881, *Rehearing Denied* 358 U. S. 923 (1958).

The Petitioner nonetheless claims that Illinois attorney disciplinary proceedings which require a lawyer to present evidence in mitigation, if any, prior to a determination of whether he acted unethically, violates due process (*Petition*, pp. 11-13.) He suggests that the Fourteenth Amendment requires a bifurcated hearing procedure with separate hearings on "guilt" and "sanctions", instead of the combined system used in Illinois.

Although he extensively relies on criminal law authority to underlie his argument, the Petitioner cites no authority which holds that a bifurcated hearing procedure is either necessary or desirable. The decisions referred to differ significantly from the present case and are not inconsistent with the decision of the Court below in any way.

Petitioner misunderstands the nature of disciplinary proceedings in Illinois. An attorney disciplinary proceeding is an original proceeding in the Illinois Supreme Court. *In re Taylor*, 6 Ill. Dec. 898, 363 N. E. 2d 845 (1977); *In re Donaghy*, 393

(Footnote continued from preceding page.)
422 U. S. 806 (1975); *Desist* v. *United States*, 394 U. S. 244 (1969).

Ill. 621, 66 N. E. 2d 856 (1946). While the findings and recommendations of the hearing board are entitled to some weight, ultimate responsibility for imposition of discipline rests with the Supreme Court of Illinois. *In re Royal*, 29 Ill. 2d 458, 194 N. E. 2d 242. Since it is the Supreme Court of Illinois which imposes discipline after a review of the entire record, it is not clear what purpose would be served by a separate "sanctions" hearing before the hearing board.

Petitioner had every opportunity to submit evidence of mitigation at the hearing. He failed to do so. By evidence that was clear and convincing, he was found to have converted client funds and to have made false representations to the clients. He now claims that a bifurcated hearing procedure is guaranteed by the Fourteenth Amendment. The Court below correctly determined that the Fourteenth Amendment does not mandate a bifurcated hearing procedure in an attorney disciplinary action.

CONCLUSION.

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent.

JAMES J. GROGAN, Senior Law Student, licensed pursuant to Rule 711 of the Supreme Court of Illinois, Loyola University of Chicago, assisted in the research and preparation of this brief.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. [redacted] 78-1887

WILLIAM MAULDIN SMITH,

Petitioner,

vs.

ATTORNEY REGISTRATION and DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Illinois

PETITIONER'S REPLY BRIEF

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Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Illinois

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PETITIONER'S REPLY BRIEF

I.

WHERE PETITIONER, AN ATTORNEY, IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE ADVERSARY HEARING THAT RESULTED IN HIS DISBARMENT, HE HAS BEEN DENIED "DUE PROCESS" OF LAW.

Respondent, relying on *In Re Ruffalo*, 390 U.S. 544 (1968), asserts that "Attorney disciplinary proceedings are deemed to be free of any due process defects so far

as procedure is concerned if the basic requirements of notice and hearings are met." Reliance on *In Re Ruffalo* is misplaced. There the court was not asked to and did not consider whether an attorney at a disciplinary proceeding has a due process right to counsel.

Reliance on the proposition that disciplinary proceedings are "not to decide criminality of a person's act, but rather to determine the moral fitness of an attorney to continue practice of law" does not resolve the issue of whether the attorney has a due process right to counsel. Where the proceedings are *adversary* and the State is represented by counsel, due process requires that a respondent have counsel. See *Gagnon v. Scarpelli*, 411 U.S. 778, 36 L.Ed. 2d 656 (1973). And the right to counsel must mean the right of effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 25 L.Ed. 2d 763 (1970).

Respondent asserts that because there is no case specifically so holding, there is no right to effective assistance of counsel fashioned by the Due Process Clause of the Constitution. This narrow view of a stagnant Due Process Clause has been frequently rejected by the court.

In *Frank v. Maryland*, 359 U.S. 360, 371, 3 L.Ed. 2d 877 (1959), the Court stated:

> "[w]hat free people have found consistent with their enjoyment of freedom for centuries . . . does not freeze due process within the confines of historical facts . . . 'It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.' *Wolf v. Colorado*, 338 U.S. 25, 27 . . ."

Respondent has neither asserted nor demonstrated that the petitioner's representation below satisfied a due process standard of effective assistance of counsel.

Respondent has not so asserted because it is self evident that the representation afforded petitioner was so abysmally poor as to be no representation at all.

II.

THE ILLINOIS "ATTORNEY DISCIPLINARY PROCEEDING" THAT REQUIRES A LAWYER TO PRESENT ANY MITIGATION EVIDENCE PRIOR TO A DETERMINATION OF WHETHER HE ACTED UNETHICALLY OR FOREGO PRESENTING MITIGATION EVIDENCE VIOLATES DUE PROCESS.

The State's "compelling interest in the practice of the legal profession" and the State Supreme Court's "inherent power to discipline attorneys" does not provide an exemption for the disciplinary procedures from the Due Process provisions of the United States Constitution.

Although attorney disciplinary proceedings are original proceedings in the Illinois Supreme Court, a respondent in such proceedings, if he has matters in mitigation affecting the amount or type of discipline to be imposed, must present such evidence before the hearing panel. Ill. Rev. Stats., Chap. 110A, (Sec. 770, Rules 1-1 through 10-7). The Illinois Supreme Court, when making its final determination, acts as a reviewing court. Although the recommendations of the hearing panel need not be followed by the court, there is not a procedure to present evidence directly to the Illinois Supreme Court.

Under the Illinois procedure an attorney must choose between presenting mitigation evidence prior to a determination of "guilt," or not at all. The Illinois procedure violates Due Process.

CONCLUSION

As suggested by Honorable Chief Justice Warren Burger, there exists more emphasis on regulation and discipline of attorneys. Although such regulation is desirous, such "disciplinary procedure" must satisfy due process. Certiorari should be granted so that this court can set due process guidelines for the State courts.

For the foregoing reasons certiorari should be allowed to review the decision of the Illinois Supreme Court.

Respectfully submitted,

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